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**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

**JAN 9 1995**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

In The Matter of

Policies and Rules Concerning  
Unauthorized Changes of Consumers'  
Long Distance Carriers

**CC Docket No. 94-129**

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**COMMENTS OF  
MIDCOM COMMUNICATIONS INC.**

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## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
SUMMARY .....	ii
I. INTRODUCTION .....	2
II. ARGUMENT .....	5
A. The Guidelines Proposed in the NPRM Regarding the Form and Content of LOAs Strike an Appropriate Balance .....	5
B. Any Limitations on Marketing Options Should be Narrowly Tailored .....	7
C. Relieving Customers of their Obligation to Pay for Long Distance Service in the Event of "Unknowing" PIC Changes is an Open Invitation for Abuse .....	11
III. CONCLUSION .....	14

## **SUMMARY**

MIDCOM Communications Inc. agrees with the Commission that "slamming" cannot, and should not, be tolerated, and supports the adoption of such safeguards as are reasonably necessary to ensure that consumers are not switched from one interexchange carrier ("IXC") to another without their authority and/or knowledge. The consuming public, however, also benefits greatly from the lower prices and enhanced customer service generated by a dynamic and competitive telecommunications marketplace. MIDCOM, accordingly, submits the safeguards adopted to protect consumers from slamming must be carefully crafted and narrowly tailored so as not to create and impose unnecessary administrative and cost burdens on smaller IXCs or inadvertently hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXCs to attract new customers.

Consistent with these views, MIDCOM advocates the following:

- The Commission should not prescribe either the text or the font or point size of LOAs, adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility;
- The Commission should permit, but not require, resale carriers to identify on their LOAs their network providers so long as the role of the underlying facilities-based carrier is clearly and unambiguously described;
- The Commission should not adopt a blanket prohibition on combining inducements and LOAs on the same document, prohibiting instead combinations of inducements and LOAs which obscure in a material way the purpose of the LOA to authorize a PIC change;
- The Commission should not to adopt any broad prohibition on the use of inducements in marketing long distance services or any limits on the nature of the materials that can be included in a mailing containing an LOA;

- The Commission should not limit carriers' use of "800" numbers to market long distance service, but MIDCOM would not oppose the extension of existing telemarketing verification procedures to "800" sales;
- The Commission should adopt a compensation scheme pursuant to which consumers would be made "whole," but not afforded a "windfall," in the event of an unauthorized PIC change and thus should limit compensation to an amount equal to the difference between the amounts paid by the consumer for long distance service following the unauthorized PIC change and the lower amount the consumer would have paid but for the unauthorized PIC change;
- The Commission should limit the compensation scheme to the residential market, applying it in the business environment only if bad faith or wrongful intent can be shown; and
- The Commission should not relieve consumers who have been wrongfully converted from one IXC to another of their obligations under optional calling plans, but should require the unauthorized IXC to reimburse wrongfully-converted consumers for one month's flat monthly charge under such optional calling plans.

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**COMMENTS OF  
MIDCOM COMMUNICATIONS INC.**

MIDCOM Communications Inc. ("MIDCOM"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. §1.415, hereby submits its comments on the rules proposed and the issues raised in the Notice of Proposed Rule Making, FCC 94-292 ("NPRM") issued by the Commission on November 10, 1994 in the captioned proceeding. MIDCOM agrees with the Commission that slamming cannot, and should not, be tolerated, and supports the adoption of such safeguards as are reasonably necessary to ensure that consumers are not switched from one interexchange carrier ("IXC") to another without their authority and/or knowledge. MIDCOM, however, strongly encourages the Commission to carefully craft and narrowly tailor safeguards against slamming both to minimize resultant regulatory burdens and to avoid unduly hindering the ability of smaller IXCs to compete effectively. MIDCOM urges the Commission to bear in mind that any limitations on marketing inure to the benefit of large, established providers already possessed of substantial market shares.

I.

**INTRODUCTION**

MIDCOM is one of the fastest growing providers, and one of the largest resellers, of interexchange telecommunications services in the United States; indeed, MIDCOM was recently identified in "Inc." Magazine as the 11th fastest growing privately-held company in the nation. Operating as both a "switched" and "switchless" resale carrier, MIDCOM is a full service provider of seamlessly integrated communications solutions for generally small and mid-sized businesses. Utilizing the networks of AT&T Corp., Sprint Corporation, MCI Telecommunications Corp. and VMTel, Inc., MIDCOM provides a wide array of integrated voice and data telecommunications services, as well a variety of enhanced, value-added products and services. Trading on its massive traffic volumes, MIDCOM is able to offer its small and mid-sized commercial customers access to rates and services otherwise available only to much larger users. Moreover, MIDCOM's ability to serve the needs of such small and mid-sized accounts is enhanced by its ability to provide highly sophisticated customer-oriented billing and its nationwide network of sales and service offices through which it provides local, personalized customer support.

MIDCOM is filing comments here because its continued growth and expansion are dependent upon its ability to attract new customers. And regulations governing the manner in which consumers may be converted from one IXC to another obviously impact that ability. As noted above, MIDCOM supports the Commission's efforts to protect consumers from slamming and to ensure that consumers are not switched from one IXC

to another unless such a conversion is both intended and authorized. MIDCOM is well aware that in the intensely competitive long distance telecommunications marketplace, fair and honest business practices are critical to the long term survival of individual resale carriers and the resale industry as a whole. Accordingly, MIDCOM has pledged to abide by, and does adhere to, the "Code of Ethics" of the Telecommunications Resellers Association ("TRA") which requires TRA members to deal honestly, fairly and ethically with both consumers and other carriers and to commit, among other things, not to "submit orders for provisioning without customer authorization or participate in 'slamming' activities."

MIDCOM, however, submits that safeguards adopted to minimize slamming should not generate unnecessary administrative and cost burdens on smaller IXC's. MIDCOM further submits that such safeguards should not inadvertently hinder competition by imposing undue limits on promotional and marketing activities, thereby impeding the ability of smaller IXC's to attract new customers. Obviously a balance is required. Certainly slamming cannot, and should not, be tolerated, and such safeguards as are reasonably necessary to protect against such activities should be adopted. The consuming public, however, also benefits greatly from the lower prices and enhanced customer service that a dynamic and competitive telecommunications marketplace generates. Protections against slamming, accordingly, must be carefully crafted and narrowly tailored to safeguard the consuming public without denying it these myriad benefits.

The Commission recognized and followed these principals three years ago in crafting procedures for verification of long distance telemarketing sales.<sup>1/</sup> Thus, in the PIC Verification Order, the Commission stated that "[i]n considering the advisability of imposing requirements on carriers of all sizes, we seek to benefit consumers without unreasonably burdening competition in the interexchange market."<sup>2/</sup> Moreover, the Commission "weighed [the burden [on carriers] of implementing improved verification procedures] against the need to protect consumers against unwanted changes in their long distance service"<sup>3/</sup> and emphasized its "special concerns about potential costs imposed on smaller IXCs."<sup>4/</sup> As a result, the Commission declined to adopt procedures it believed would have been unduly burdensome and/or costly for smaller carriers or which would have impeded the ability of smaller carriers to legitimately compete for new customers.<sup>5/</sup> Indeed, the Commission took pains to ensure that its revised verification procedures would "facilitate the IXCs' marketing efforts while maintaining the protection embodied in the requirement for LOAs."<sup>6/</sup> MIDCOM urges the Commission to apply the same principals here in reevaluating its LOA requirements.

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<sup>1/</sup> Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rod 1038 (1992) ("PIC Verification Order"), recon. denied, 8 FCC Rod 3215 (1993).

<sup>2/</sup> Id. at ¶42.

<sup>3/</sup> Id. at ¶44.

<sup>4/</sup> Id. at ¶45.

<sup>5/</sup> Id. at ¶¶42-51; see also Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935, 942 (1985) ("Waiver Order").

<sup>6/</sup> PIC Verification Order at ¶48; see also Illinois Citizens Utility Board Petition for Rulemaking, 2 FCC Rod 1726, ¶19 (1987) ("Illinois CUB Order").



## II.

### ARGUMENT

#### **A. The Guidelines Proposed in the NPRM Regarding the Form and Content of LOAs Strike an Appropriate Balance.**

MIDCOM agrees with the Commission that the requirements governing letters of agency ("LOAs") as set forth in the Commission's previously-issued Allocation Order<sup>7/</sup> and PIC Verification Order should be codified into "one standard rule." NPRM at ¶¶8-10. Not only does the LOA provide, as pointed out by the Commission (at ¶7), a "useful and important consumer protection mechanism," but by minimizing slamming, LOAs help to safeguard the interests of carriers as well.<sup>8/</sup> And MIDCOM agrees with the Commission that LOAs will perform these protective functions only if consumers, when they sign an LOA, are aware that they are changing their long distance carriers. NPRM at ¶7.

MIDCOM, accordingly, endorses the Commission's proposals to require that all LOAs "be printed with a type of sufficient size and readable type to be clearly legible," specify the customer's billing name and address and each covered telephone number, and confirm in "clear and unambiguous" language that (i) the customer is changing its

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<sup>7/</sup> Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, (1985) ("Allocation Order"), recon. denied, 102 FCC 2d 503 (1985).

<sup>8/</sup> Of course, there are other means of protecting against slamming, including the confirmation procedures set forth in Section 64.1100 of the Commission's Rules, 47 CFR §64.1100, for verifying telemarketing sales of long distance service — i.e., "800" number electronic verification, verification by an independent third party, and verification by transmission of an information package which includes a prepaid, returnable postcard by means of which a customer may deny, cancel or confirm the PIC change during a 14-day waiting period. It is MIDCOM's understanding that LOAs, following the adoption of proposed Section 64.1150, will continue to constitute only one means of documenting a consumer's election to switch long distance carriers.

primary interexchange carrier ("PIC") and is designating its newly selected carrier as its agent for the PIC change, and (ii) that the customer understands that it may designate only one long distance carrier per telephone number, that selection of multiple carriers will invalidate all PIC selections and that a PIC change may involve a charge. NPRM at ¶10. The proposed guidelines are sufficiently detailed to ensure that LOAs set forth clearly such information as is necessary to allow for informed consumer actions, without imposing on carriers unnecessary regulatory burdens. Any greater degree of specificity would disrupt this delicate balance, generating costs and administrative burdens without any offsetting benefit.

If, for example, the Commission were to prescribe certain language or mandate the use of a specific font or point size, carriers would be required to discard otherwise reasonable and legitimate LOAs (and the money and resources invested therein) simply because their existing LOAs were not crafted in the precise manner required by the Commission. More importantly, if the Commission and the various state regulatory authorities were each to specify in precise detail the content and form of the LOAs that could be used within their respective jurisdictions, carriers could well be confronted with conflicting language and type specifications. Addressing and conforming to such conflicting requirements would be costly and burdensome for carriers.<sup>9/</sup> Carriers, for example, could be required to develop and employ multiple versions of LOAs or to address inconsistent requirements in single LOAs. MIDCOM thus strongly urges the

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<sup>9/</sup> Even seemingly innocuous regulations such as a requirement that all LOAs must be captioned "An Order To Change My Long Distance Telephone Service Provider" could produce costs and burdens of this sort.

Commission not to prescribe either the text or the font or point size of LOAs, adopting instead key guidelines regarding the form and content of LOAs which would accomplish the same purpose while preserving for carriers a necessary modicum of flexibility.

MIDCOM recommends that the Commission adopt a similarly balanced approach to the identification of carriers on the LOA. MIDCOM fully agrees with the Commission that each LOA should clearly and unambiguously identify the carrier that will provide long distance telephone service to the consumer as the its primary IXC. MIDCOM, however, strongly urges the Commission not to prohibit identification of other carriers on the LOA so long as the roles of such other carriers are clearly and unambiguously described. In particular, MIDCOM urges the Commission to permit, but not require, resale carriers to identify their underlying network providers on LOAs. Even while consumers recognize that the resale carrier will be their primary IXC, they not infrequently require assurances that their calls will be routed over one or another carrier's physical network. Limiting the LOA only to identification of the primary IXC thus could impede the ability of resale carriers to compete effectively. And while the Commission's concern that consumers not be mislead or confused by the identification of multiple carriers on an LOA is obviously valid, that concern can be addressed simply by requiring that the LOA clearly and unambiguously identify the role of each carrier identified thereon.

**B. Any Limitations on Marketing Options  
Should be Narrowly Tailored.**

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As noted above, MIDCOM supports the Commission's efforts to ensure that consumers are not switched from one IXC to another without their authority and/or

knowledge. MIDCOM further agrees with the Commission that when a consumer signs an LOA, it should know that as a result of that action its primary IXC will be changed. To the extent that the coupling of LOAs with inducements has confused or misled the consuming public, MIDCOM agrees that action should be taken to rectify this problem. The action taken should, however, be narrowly tailored in order to minimize any associated adverse impact on the ability of smaller IXCs to compete effectively.

MIDCOM is concerned that proposed Section 64.1150's blanket prohibition on combining inducements and LOAs on the same document, as well as its identification of PIC changes as the "sole purpose" of an LOA, may unnecessarily interfere with legitimate marketing efforts to the detriment of long-distance competition. For example, a check entitling the customer to a specified amount of free long distance service for switching its primary IXC could be attached to an LOA without compromising in any way the clear import of the LOA. Envision by way of illustration a document captioned in large, bold letters "An Order To Change My Long Distance Telephone Service Provider" which in addition to clearly and unambiguously confirming in large and readable type all of the information listed in proposed Section 64.1150(d), includes at the bottom a check entitling the customer to \$50 of long distance service. The customer would not be confused or misled as to the purpose of such a document. Banning it would thus serve no purpose other than to deny carriers a legitimate marketing tool.

Certainly, LOAs which, through combination with inducements or otherwise, are designed to, or would, confuse or mislead, should be prohibited. This prohibition, however, need not be implemented in blunderbuss fashion, leaving in its wake a host of

legitimate marketing tools. Confusing and misleading combinations, not all combinations, of LOAs and inducements should be targeted. IXC's should not be denied the advantage of marketing tools available to other product and service providers when the use of those tools produces no adverse impact on consumers.

MIDCOM thus supports the recommendation of TRA that proposed Section 64.1150 be modified in two key respects. MIDCOM agrees with TRA that the first sentence of proposed Section 64.1150(b) should be deleted. MIDCOM further agrees with TRA that proposed Section 64.1150(c) should be revised to read:

(c) The letter of agency shall not be combined with inducements of any kind on the same document in a manner which obscures in any material way the purpose of the letter of agency to authorize an interexchange carrier to initiate a primary interexchange carrier change.

Implementation of these recommendations would prohibit marketing activities which are designed to, or would, mislead or confuse consumers without eliminating promotional efforts that would not have such an adverse impact. A more surgical approach, TRA's proposal would safeguard the interests of consumers and carriers alike.<sup>10/</sup>

Consistent with the above recommendations, MIDCOM also opposes any broad prohibition on the use of inducements in marketing long distance service or any limits on the nature of materials that can be included in a single mailing that contains an LOA. NPRM at ¶12. As the Commission has recognized, inducements can be "proper and effective marketing devices for attracting customers to an IXC's service."

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<sup>10/</sup> In instances in which a carrier fails to comply with Commission guidelines or engages in slamming activities, more specific and demanding requirements can be imposed. See, e.g., Cherry Communications, Inc., 9 FCC Rcd 2086 (1994). Undue marketing restraints should not be imposed on all in order to prevent misconduct by a few.

Inducements are commonly used in, and are a well excepted means of, mass marketing a wide variety of products and services ranging from airline travel to magazines to banking services to office products. Inducements as a marketing tool are particularly important in more concentrated industries. Any limitation on marketing obviously inures to the benefit of large, established providers with substantial market shares. Thus in an industry in which one carrier holds a 60 percent market share and with two other carriers, controls more than 85 percent of the market, regulations which restrict the marketing flexibility of the approximately 1,000 small to mid-sized carriers that occupy the remaining 10 to 15 percent of the market should not be adopted lightly. Small to mid-sized carriers need the ability to market creatively and aggressively in order to compete with the major carriers and should not be limited in those marketing efforts unless it is necessary to do so in order to protect the consuming public, and then the restrictions should be narrowly tailored.<sup>11/</sup>

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<sup>11/</sup> In adopting "balloting" procedures nearly a decade ago, the FCC confronted an analogous situation and took care to avoid favoring the entrenched service provider:

The BOCs through their tariffs automatically presubscribe a customer to AT&T and only change that presubscription to another carrier upon request of the customer. As a result of this "default" procedure, AT&T's customers may acquire its services by doing nothing. The other IXCs must, however, aggressively advertise in order to get their potential customers to take an affirmative action and select an IXC. This practice clearly accords AT&T preferential treatment and gives it an advantage over its competitors. The marketing advantage that AT&T enjoys is not predicated on any quality or pricing difference but rather on its historical monopoly position. [footnotes omitted].

Consistent with this view, MIDCOM joins TRA in not opposing proposed Section 64.1150(e). MIDCOM agrees with TRA and the Commission that use of "negative option" LOAs enhances the potential for inadvertent, and hence unknowing, PIC changes. NPRM at ¶11. Thus MIDCOM agrees that a prohibition on the use of "negative option" LOAs may be necessary to protect the consuming public.

MIDCOM does not agree, however, that limitations should be placed on a carriers' use of "800" numbers as a marketing device. NPRM at ¶19. Whether a consumer calls a carrier's "800" number to request information or to initiate a PIC change is irrelevant if the consumer knowingly decides during the course of the call to initiate a PIC change. "800" numbers are one of the most widely-used and effective marketing tools available today. There are few products which are not marketed through "800" numbers. Carriers should not be denied altogether of the benefits of "800" number marketing simply because of a perceived potential for abuse. To the extent that the Commission anticipates a problem, MIDCOM agrees with TRA that the preferred solution would be to apply the existing telemarketing verification procedures to "800" number sales.

**C. Relieving Customers of their Obligation to Pay for Long Distance Service in the Event of 'Unknowing' PIC Changes is an Open Invitation for Abuse.**

The Commission has requested comment on whether "any adjustments to long distance telephone charges should be made for consumers who are victims of unauthorized PIC conversions." NPRM at ¶17. MIDCOM does not oppose the imposition on carriers who are guilty of slamming of the obligation to compensate consumers who are wrongfully converted to an IXC not of their choosing for damages suffered. MIDCOM

is concerned, however, that a compensation scheme that does more than make the wronged consumer "whole" will be an open invitation to abuse.

The NPRM (at ¶17) suggests two alternative compensation schemes. The first such scheme would reimburse consumers for any amounts paid for long telephone service over and above the amount that they would have paid but for the unauthorized PIC change. The second such scheme would relieve wrongfully-converted consumers altogether of the responsibility to pay the unauthorized IXC for the long distance telephone service it provided to them. The first approach would make the wrongfully-converted consumers whole; the second would provide them a windfall. The second approach, accordingly, would provide the unscrupulous with an incentive to claim wrongful conversion in order to avoid payment of legitimate long distance charges. The second approach would also impose undue penalties on carriers that had converted a consumer to their service in good faith only to find that the spouse or a relative from whom they had received authority for the PIC change was not actually empowered to grant that authority. The first approach would compensate the customer without providing an incentive to cheat, and would penalize the unauthorized carrier without unduly punishing carriers who are guilty of unintended unauthorized conversions.

With respect to the effect that unauthorized PIC conversions have on optional calling plans and the consumers enrolled therein, MIDCOM endorses TRA's recommendation that consumers not be relieved of their obligations under the optional calling plan in the event of an unauthorized PIC conversion, but instead be reimbursed by the unauthorized IXC for one month's flat minimum charge. As discussed above,



MIDCOM agrees that consumers should be made whole, but urges the Commission in so doing not to penalize carriers who have been victimized by the same slamming activities. Given that the consumer should become aware of any wrongful conversion within a month, reimbursement of one month's flat minimum charge should make the consumer whole. And requiring the carrier which implemented the unauthorized change to make the reimbursement focuses the penalty on the appropriate party.

The compensation scheme adopted by the Commission, however, should be applied only to residential, and not to business users, except in circumstances in which bad faith or wrongful intent can be shown. As the Commission has recognized (at ¶15), in the business environment, there is a far greater chance that an executed LOA may not confer authority for a PIC change. A carrier that acts on an LOA which it knows to be signed by a person without authority should be required to make the business user whole. But it would be inequitable to penalize a carrier that acts on an LOA signed by an employee or other representative of a business which it in good faith believes grants it authority to implement a PIC change.


III.

**CONCLUSION**

By reason of the foregoing, MIDCOM endorses proposed Section 64.1150, as modified in a manner consistent with these Comments. As noted above, protections against slamming should be carefully crafted and narrowly tailored so as to effectively safeguard the consuming public while minimizing the regulatory burden and avoiding any adverse effect on competition.

Respectfully submitted,

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